TECK LIONG (EM) SDN BHD

v.

HONG LEONG ASSURANCE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI JC
[CIVIL SUIT NO: D3(D9) 23-3777-87]
4 OCTOBER 2001

INSURANCE: *Fire Insurance - Construction of policy - Warranty clause - Whether warranty a condition precedent to right of insured to claim - Breach of - Whether defendant entitled to repudiate liability - Payment made to mortgagee/chargee by defendant - Whether a waiver of breach of warranty*

INSURANCE: *Fire Insurance - Proof of loss - Quantity of stock-in-trade destroyed by fire - Question of facts on evidence*

This was the plaintiff's claim of the insured sum under a fire insurance policy against the insurer/defendant for the loss of the plaintiff's stock-in-trade, ie cotton bales, destroyed by fire. The plaintiff alleged that the number of cotton bales destroyed was worth more than the sum insured.

Held:

[1] Warranty 9(A) of the fire policy was a condition precedent to the right of the insured to recover any sum insured claimed thereunder. Since the plaintiff did not hold any valid trading licence from the local authority to operate its business on the date of the fire, the plaintiff had breached warranty 9(a) and thus, the defendant was entitled to repudiate liability to the plaintiff in respect of this claim.

[2] In reference to the quantity of cotton bales destroyed at the time of the fire, the evidence of the defendant's witnesses was accepted in preference to that of the plaintiff's witnesses. The defendant's witnesses' findings showed that the total number of cotton bales present at the time of fire was significantly less than the quantity claimed by the plaintiff. On this ground also, the plaintiff's claim should be dismissed.

[3] In submission, the plaintiff alleged that the defendant by making certain payment into the mortgagee/chargee bank of the stock-in-trade of the plaintiff had subsequently waived the breach of warranty 9(a). However, the issue of waiver should have been pleaded by the plaintiff. No such

issue arose during pleadings. It was not proper for the plaintiff to raise this issue at the stage of submission after the whole trial was over.

[Plaintiff's claim dismissed with costs.]

Case(s) referred to:

Blay v. Pollard & Morris [1930] IKB 628 ***(foll)***
Chong Kok Hwa v. Taisho Marine & Fire Insurance Co Ltd [1977] 1 MLJ 244 ***(foll)***
Dawson Ltd v. Bonnin [1922] 2 AC 413 ***(foll)***
General Accident, Fire and Life Assurance Corporation Ltd and Drysdale v. Midland Bank Ltd [1940] 3 All ER 252 ***(foll)***
Hj Mohammed Dom v. Sakiman [1956] MLJ 45 ***(foll)***
Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 ***(foll)***
Lombard Australia Ltd v. NRMA Insurance Ltd [1969] 1 Lloyd's Law Report 575 ***(foll)***
New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 MLJ 185 ***(foll)***
Pioneer Concrete (UK) Ltd v. National Employers Mutual General Insurance Association Ltd [1985] 1 Lloyd's Rep 274 ***(foll)***
Suhaimi Ibrahim v. United Malayan Insurance Co Ltd [1966] 1 MLJ 140 ***(foll)***
Titiria Sdn Bhd v. Zurich Insurance (M) Sdn Bhd [1996] 1 CLJ 105 ***(foll)***

Legislation referred to:

Trade Licensing Ordinance (Cap. 144) (Sabah), ss. 3(1), 6

Other source(s) referred to:

Poh Chu Chai, *Law of Insurance*, 3rd edn, p 225

For the plaintiff - Paul Kwong Kum Wah (R Mohan); M/s Azman Davidson & Co
For the defendant - Khoo Eng Chin; M/s Khoo & Sidhu

Reported by Raja Vishnu Sivarajah

JUDGMENT

Ramly Ali JC:

The Plaintiff's Claim

The plaintiff is the insured in a fire insurance policy and the defendant is the insurer. The plaintiff's claim against the defendant in this action is under a Fire Insurance Policy No: N86100 A03380 dated 6 February 1986, issued by the defendant to the plaintiff to cover the plaintiff's stock-in-trade stored in a warehouse situated at Lot 174, Jalan Kemajuan, Labuan, for a sum of RM1,000,000. The policy was valid for the period of 12 January 1987 to 12 January 1988. Fire occurred at the warehouse on 29 January 1987 and thus destroying all stock-in-trade stored therein. The plaintiff's case is that, at the time of the fire, there were, *inter alia*, 1090 bales of Chinese Cotton in the warehouse worth more than the sum insured. The plaintiff is claiming the insured sum.

The Defendant's Defence

The defendant, on the other hand, has raised two points in its defence, namely:

i) the plaintiff was in breach of Warranty 9(a) of the policy in that the plaintiff did not, on the date of the fire, hold any valid trading licence from the Labuan Local Authority to operate its business; and

ii) the stock-in-trade in the warehouse, particularly the number of cotton bales destroyed, at the time of the fire was less than what is claimed by the plaintiff.

Breach Of Warranty Of The Policy

The preamble of the relevant insurance policy provides as follows:

> The company agrees (subject to the Conditions contained herein or endorsed or otherwise expressed hereon which conditions shall so far as the nature of them respectively will permit be deemed to be conditions precedent to the right of the Insured to recover hereunder) that if the property insured described in the said Schedule or any part of such property be destroyed or damaged by FIRE ... the Company will pay or make good to the Insured the value of the property at the time of the happening of its destruction or the amount of such damage.

Warranty 9(a) of the same policy provides:

> Warranty that during the currency of this policy the Insured shall hold such Licence or Licences as is or are required by the Local Municipal or other Authorities and shall fully comply the conditions and requirements thereof at all times.

By virtue of the preamble of the policy, Warranty 9(a) of the policy shall be deemed to be condition precedent to the right of the insured to recover any sum insured claimed thereunder. Warranty 9(a) clearly shows that the plaintiff was required at all relevant times, to have a valid trading licence from the Labuan Local Authority to carry on its business. This is so required under s. 3(1) of the Trade Licensing Ordinance (Cap. 144) (Sabah), the relevant applicable laws relating to the matter, which says:

> No person shall carry on in Sabah, whether as principal or agent, any business in respect of which a valid trading licence is not for the time being in force or carry on any such business in any place other than that specified in such licence.

Even though Labuan was already a Federal Territory at the relevant times, but the applicable laws relating to trades licensing in Labuan at the material times was still the Trade Licensing Ordinance (Cap. 144) (Sabah).

Section 6 of the said Ordinance provides:

> A trading licence shall continue in force until the thirty-first day of December next following the date of commencement.

Based on these two sections, it is clear that application and issuance of trading licence under the said Ordinance is an annual affair. This means that a trading licence issued under the said Ordinance is valid only from the date of its issuance (not the date of its application) to the 31st day of December the same year.

In the present case, the fire occurred on 29 January 1987. The plaintiff's trading licence for 1986 had already expired on 31 December 1986 by operation of law. The plaintiff applied for the renewal of its trading licence on 2 January 1987 (after the expiry of the 1986's licence). The plaintiff did not obtain the 1987 trading licence until 16 February 1987. From the reading of s. 6 of the said Ordinance, the 1987 trading licence issued by the Labuan Local Authority to the plaintiff could not have a retrospective effect and could only be valid from 16 February 1987 to 31 December 1987. There is no provision either in the said Ordinance or any rule made thereunder which empowers the Labuan Local Authority to extend the validity period of a trading licence provided under s. 6 of the said Ordinance. The Labuan Local Authority may (as testified by PW5) administratively grant traders a grace period till 31 January of the issuing year to make an application to renew their trading licence, but as a matter of law, the licence issued cannot be effective retrospectively to the 1st January of the same year. Any act of the Labuan Local Authority to treat the licence retrospectively is *ultra vires* the said Ordinance. This was confirmed by PW5, Penolong Setiausaha, Majlis Perbandaran Labuan when she said under cross examination on 28 November 2000 that: "I am aware and understood s. 3 of the Ordinance. Just now I said there was a grace period for renewal i.e. 15 November to end of January of the following year. It's not provided for under any rules". Therefore, it is clear from the available facts and in law that the plaintiff did not have a valid trading licence to operate its business when the fire occurred on 29 January 1987.

The plaintiff's counsel submitted that the Labuan Local Authority had confirmed *vide* its letter dated 28 October 2000 (exh. P47) that the plaintiff was trading legally with a valid licence during the specified dates i.e. 1 January 1987 to 31 December 1987. Thus, the plaintiff argued that, even though there was no licence issued under the said Ordinance, there was an implied licence issued by the Labuan Local Authority and that would satisfy Warranty 9(a) of the Policy.

With respect, I cannot agree with the above submission. The said confirmation given by the Labuan Local Authority is *ultra vires* the Ordinance, as the authority actually has no power to extend or to treat retrospectively the validity of the trading licence issued under the said Ordinance. In law, the said confirmation is worthless and the question of "implied licence" as raised by the plaintiff does not arise.

When a term in a contract of insurance policy is stipulated to be a condition precedent to liability of an insurer, that condition has to be strictly complied with by an insured before the insured is entitled to claim in the policy. (see: p. 225 of the *Law of Insurance* (third edition) by Poh Chu Chai).

In *Chong Kok Hwa v. Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244 it was decided by Ajaib Singh J, *inter alia*, that "when a term in an insurance contract was stipulated to be a condition precedent to the liability of an insurer, the insurer was not liable under the policy unless the term has been strictly complied with by the insured".

In *Pioneer Concrete (UK) Ltd v. National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's Rep. 274, Bingham J, ruled that an insurer was entitled to avoid liability under an insurance contract for breach of a condition precedent without having to show that he had been prejudiced by the breach of condition. In another case, *Suhaimi Ibrahim v. United Malayan Insurance Co Ltd* [1966] 1 MLJ 140, Mac Intyre J held that when an insured was in breach of a warranty under an insurance contract, an insurer was entitled to avoid liability under the contract for a loss which occurred after the breach of warranty. Where the statements contained in a policy formed the basis of a contract of insurance, it was held in *Dawson Ltd v. Bonnin* [1922] 2 AC 413, the truth of the statement in the policy was a condition of the liability of the insurer.

The basis of the contract, in such cases, is that the liability of the insurer is subject to the observance by the insured of the condition.

In *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 MLJ 185 the Supreme Court came to the conclusion that, the provisions of Warranty 9(a) (the same provisions in the present case) is a condition precedent which must be complied with by the insured. The same ruling was also made by Ian HC Chin J in *Titiria Sdn Bhd v. Zurich Insurance (M) Sdn Bhd* [1996] 1 CLJ 105.

In the present case the court rules that, the plaintiff did not have a valid trading licence when the fire occurred on 29 January 1987. The plaintiff was required to have such a licence at all times under s. 3(1) of the said Ordinance. Such being the case, I am of the view that the plaintiff was in breach of Warranty 9(a) of the policy when the fire occurred. Based on the above authorities I

am satisfied that the defendant is entitled to repudiate liability to the plaintiff in respect of the plaintiff's claim under the policy. Therefore, on this ground alone, the plaintiff's claim should be dismissed with costs.

Stock-In-Trade (Cotton Bales)

In the event I am wrong in coming to the above finding, I shall now deal with the second point of the defendant's defence i.e. on the balance of probabilities, whether the plaintiff has proved that there were 1090 bales of Chinese Cotton (kept in the warehouse) destroyed in the fire. In its defence, the defendant contended that the number of cotton bales destroyed in the fire was less than the number claimed by the plaintiff.

The burden is on the plaintiff to prove that there were 1090 bales of Chinese Cotton in the warehouse at No. 174, on the date of the fire and destroyed in the fire. The fact that the plaintiff did import Chinese Cotton from Hong Kong between 2 July 1986 to 30 October 1986 is not proof that the plaintiff had 1090 bales of Chinese Cotton in the said warehouse at the time of the fire on 29 January 1987.

The plaintiff is relying on the evidence of the storekeeper (PW2). PW2 claimed to have taken physical count of the bales in the said warehouse on 27 January 1987, prepared a stock list and handed over the stock list to the plaintiff's accountant on 28 January 1987. The purported stock list was not produced as evidence in court. Neither was the stock list of the goods in the warehouse as at 31 December 1986. That stock list would have shown the quantity of the bales in the said warehouse as at 31 December 1986. There is no evidence to show that the plaintiff had imported more Chinese Cotton after 31 December 1986. The stock list in p. 23 of IDTS 'C1' is the same stock list shown in p. 35 of IDTS 'C1'. It is dated 6 February 1987 (i.e. after the fire). It cannot be the stock list purported to have been prepared by PW2.

Sim Chin Hak (PW3) said in his evidence that the said stock list was prepared by the plaintiff's accountant, one Mr Seah (who had since passed away). PW3 also said that the purpose of the plaintiff's accountant preparing the stock list was to support the plaintiff's fire insurance claim. Tan Chin Fah (PW4) said in his evidence that his accounting firm was instructed by the plaintiff to carry out stock verification to determine the stock quantity at the warehouse as at midnight of 28 January 1987. The verification process was carried out after the fire. There was no physical count of the stock. PW4 did not know what stock were in the warehouse before the fire. His opinion that the stock of Chinese Cotton kept in the said warehouse as at 28 January 1987 was based on documents and information given to him. None of the alleged documents were produced in court as evidence. In the circumstances, I am of the opinion that the stock records verification (as at pp. 42-44 of IDTS 'C1') is not

sufficiently corroborated to support the evidence that there were 1090 bales of Chinese Cotton in the said warehouse at the time of the fire.

On the defence side, Leong Yee Fook (DW1), the chartered loss adjuster was instructed by the defendant to carry out investigation into the fire. He went to the fire site on 5 February 1987 and 6 February 1987. He carried out a thorough investigation at the site. In the course of his investigation, he interviewed the plaintiff's accountant, PW2 and PW3. He was not satisfied from his investigation that there were 1090 bales of Chinese Cotton in the said warehouse at the time of the fire. He recommended the defendant employ a forensic scientist to carry out further investigation. Barry Dillon (DW2) was assigned to carry out further investigation. DW1 said in his evidence, that he was present at the site when DW2 carried out his investigation. DW1 submitted two reports (D4 and D5) to the Defendant. Barry Dillon (DW2) was an independent forensic scientist who carried out further investigation at the site. He gave evidence in court at great length, as to how he carried out his investigation and how he arrived at his conclusion that there could not have been 1000 bales of Chinese Cotton in the said warehouse at the time of the fire. DW2's conclusion is that there was about 168 bales of Chinese Cotton in the said warehouse when the fire occurred. His report is as in D8. He has given a full detail as to how he carried out his investigation, the method he used to determine the likely quantity of Chinese Cotton in the said warehouse and his conclusion that there could not have been 1000 bales of Chinese Cotton in the said warehouse at the time of fire.

In his investigation DW2 has taken into consideration the possibility that a significant quantity of the cotton might have been looted after the fire and such an occurrence might invalidate his quantitative determination. However, after a thorough investigation DW2 was satisfied there was no sign of a looted fire at the scene. He concluded that for all practical purposes, all the cotton present in the warehouse at the time of the fire, had burnt in the fire. He also concluded that it may have been possible for some adults or children to have recovered fragments of cloth or even partially burnt rolls, but the quantities involved must have been totally insignificant compared to the quantity claimed.

DW2's investigation has also taken into consideration the time of burning in the fire. From evidence available he concluded that the burning time of the fire was 5.5. hours. He concluded that, if the number of cotton bales is 1000 as claimed by the plaintiff, then it would be unlikely that such complete burning would be achieved in 5.5. hours. This finding goes to show that the number of cotton bales at the time of the fire was much less than 1000. In his investigation, DW2 has also touched on the element of residue of the burnt cotton bales. Sample of unburnt cotton were taken from the site and ashed in

the laboratory and the ash content was determined to be 1.03%. This meant that if there were 1000 bales of cotton present at the time of the fire, weighing 100 tonnes, then the amount of residue left should approach one tonne. However, it was judged that there was not this quantity of ash remaining. Consideration was also given to the possibility that ashes have been washed away (as claimed by the plaintiff) but DW2's examination of the area surrounding the warehouse revealed no evidence of this.

In determining the number of cotton bales stored in the warehouse during the fire, DW2 used to count the number of steel straps and steel crimps that were left unburnt after the fire. The storekeeper confirmed that every cotton bale in the warehouse had been strapped with either four steel straps or four plastic straps with steel crimps. In his counting of the steel straps and steel crimps, DW2 discovered a total number of 258 straps, equivalent to 65 bales and a total of 413 steel crimps equivalent to 103 bales. Thus, the total indicated that the number of bales was 168.

Based on the investigations carried out by both DW1 and DW2, the defendant made an offer of RM326,000 (see: pp. 51 to 54 of IDS 'B') and that offer was accepted by Standard Chartered Bank, co-insured in the policy and as mortgagee of the plaintiff's stock-in-trade. (see: p. 17 of IDS 'B').

Both DW1 and DW2 are experts in their respective fields. They seem to be more independent in giving their evidence. Their demeanour and professionalism in giving evidence in court convinced us that their evidence was reliable and carry more weight. Their evidence was firm and not broken under intensive cross examination by the plaintiff's counsel.

Having the advantage of the hearing and observing all the witnesses for the plaintiff as well as for the defendant giving evidence in court, I have no hesitation to hold that the evidence of DW1 and DW2 should be accepted, in preference to that of the plaintiff's witnesses as to the quantity of the Chinese Cotton in the said warehouse at the time of the fire. Therefore, on this ground also, the plaintiff's claim should be dismissed with costs.

Waiver On Part Of The Defendant

In his submission, the plaintiff's counsel has raised the issue of waiver on part of the defendant. The plaintiff submitted that, if there has been a breach of Warranty 9(a) of the policy (which was denied), the defendant by making payment of RM326,000 to Standard Chartered Bank as mortgagee of the stock-in-trade of the plaintiff and co-insured in the policy, has waived the breach.

The defendant's counsel argued that waiver of the plaintiff's breach of Warranty 9(a) of the policy has not been pleaded by the plaintiff and is not an issue in this case. The counsel cited the case of *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 to support his argument.

I agree with the argument of the defendant's counsel that the issue of waiver should have been pleaded by the plaintiff. No such issue arose on the pleadings. It is not proper for the plaintiff's counsel to raise the issue at the stage of submission after the whole trial is over. In *Blay v. Pollard & Morris* [1930] IKB 628, Scrutton LJ held:

> Cases must be decided on the issues on record and if it is desired to raise other issues they must be placed on the record by amendment.

This case was followed by our court in *Hj Mohammed Dom v. Sakiman* [1956] MLJ 45, where Sir Charles Mathew CJ said:

> I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.

In any event, even though the issue of waiver is allowed to be raised by the plaintiff's counsel, I am of the view that the breach by the plaintiff of Warranty 9(a) of the policy would not effect the right of Standard Chartered Bank as chargee or mortgagee named in the policy to accept the sum of RM326,000 from the Defendant in settlement of the bank's claim and the settlement would not in any way prejudice the defendant's defence that the plaintiff had breached Warranty 9(a) of the policy. It is usual, when other parties, such as mortgagees or chargees (as in the case of Standard Chartered Bank in this case) become interested in the property insured, to indorse the policy in terms similar to those in the indorsement of the insured. The effect of such an indorsement was not to create a joint insurance, but one which operated as an indemnity in respect of each individual different loss which the various named parties might suffer. The word "insured" in those cases, must be construed and qualified by the words "for their respective rights and interests" and the indemnity must be construed as one to pay each and every of them as circumstances may require. These principles have been laid down by the Australian Supreme Court of New South Wales in *Lombard Australia Ltd v. NRMA Insurance Ltd* [1969] 1 Lloyd's Law Report 575; and the Court of Appeal in England in *General Accident, Fire and Life Assurance Corporation Ltd and Drysdale v. Midland Bank Ltd* [1940] 3 All ER 252.

On those authorities, I am of the view that the plaintiff's submission on the issue of waiver on part of the defendant, as raised by the counsel in his submission, is without merit and must be disregarded.

Conclusion

On the above consideration, I dismiss the plaintiff's claim with costs.